

# BUSINESS LAW TODAY

## If Clients Are Not the Center of Your World, You Will Be on the Periphery of Theirs

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The legal profession is changing. In making that statement, we do not refer to the increasing penetration of technology into how lawyers practice (although that is certainly the case), nor do we refer to the continuing consolidation within the ranks of law firms as regional and mid-size firms merge or create or join networks to compete with the larger firms. We refer instead to the changing dynamics of the relationships between in-house law departments and their external providers of legal service, including law firms.

The emergence and growth of corporate law departments as an ongoing fixture in the legal firmament remains one of the primary indicators—and the primary cause—of change in the legal profession with respect to corporate clients over the past few decades. As companies created and increased the size of their law departments (the largest law departments now include over 1,000 professionals), they have also improved the professional competencies of those departments to include considerable expertise in areas besides just those substantive specialties pertinent to the companies' business operations. For some time, the in-house bar has been pursuing greater and greater sophistication in the application of business concepts and methodolo-

gies to their management of legal service. For example, where they once asked law firms for invoices with detailed time-entry data (often receiving considerable push-back when they did), law departments now expect such firms to apply sophisticated project-management techniques and other tools to their company's matters.

They have also revisited their selection and retention of outside counsel. Data-driven selection methods (e.g., requests for proposals for legal service, seeking and using experiential information from candidate firms) now represent an accepted methodology. Perhaps more relevant for our purposes is the "convergence" movement, which seems to continue unabated. "Convergence" denotes the disciplined reduction by a law department in the number of law firms with which it works in an effort to forge greater efficiencies and closer relationships with the firms remaining on its "roster."

By reducing the number of law firms with which it works, a corporate law department creates greater leverage in its dealings with the firms that remain. This leverage enables the law department to achieve several things: (1) it can assure itself of the technical competence of those remaining firms by utilizing that competence as the "price of admission to the dance"; (2) it can de-

sign the parameters of the relationship it wishes to have with those firms, secure in the belief that they will be willing and able to bear some costs associated with recalibrating the relationship; and (3) it can design better metrics for the management of legal service due to the smaller number of firms—and lawyers—with which it will work and manage going forward.

All of this means that the selection and retention of law firms by corporate law departments increasingly will revolve around "relationship issues." By "relationship issues," we do not mean to suggest that developing personal friendships with in-house lawyers by offering entertainment in the form of invitations to professional sporting events, musical performances, or high-priced dinner discussions will lead to greater business for law firms. Rather, corporate law departments increasingly will select those law firms that "get it" and demonstrate a willingness to work with their in-house compatriots as equal partners and *in the way that each specific law department wants*, even if that differs from how those firms work with their other clients.

### The Implications of Change

What does this portend for the law profession and, in particular, for law firms? First,

the future likely will involve much greater competition for a company's business and, specifically, for its billings. Such competition will be different in terms of both quality and quantity because the inelasticity of the time-based billing paradigm has caused corporate clients, led by the in-house bar, to explore alternative means of delivering legal counsel and related services that their business operations need. Second (and this is related to the first point), the client's substantive needs *and service-focused preferences* will dominate the selection process. The choice of which service provider to use increasingly will revolve around the relationship issues discussed above as expressed by the client. How can law firms successfully address those issues? The short answer is that they must make the client's service preferences the central focus of their service delivery.

#### **"Value"—What Do Clients Want and What Does It Mean?**

The Association of Corporate Counsel (ACC) launched the ACC Value Challenge in 2008 "to reconnect the value and the cost of legal services." ACC determined not to provide in the ACC Value Challenge a single definition of "value," opting instead to exhort ACC members to discuss the issue with their outside legal-service providers and develop their own definitions of the term to suit their respective company's needs. In the context of legal service, of course, the term "value" has not had a clear-cut or easily measureable meaning. Slightly more than one year after ACC launched the ACC Value Challenge, one commentator wrote, "[m]uch remains confused and unclear about that term." R. Morrison, *Making Some Sense Out of the Value Gap*, NAT'L L. J. (Nov. 9, 2009).

Although a single definition remains elusive (at least at this stage of the dialogue within the profession), we can identify some traits or characteristics of higher-value legal service that could help us to forge something approaching a working definition. These traits (referred to herein as value-related qualities, or VRQs) may not comprise a definition in the pure sense of that word. They may, however, allow in-house and outside attorneys to develop a

shared language to assist the company's in-house and outside lawyers to provide legal service that more closely mirrors its value-related needs and expectations. In light of the variation among clients' perceptions of value, perhaps we should not seek a single definition of "value," but instead a framework or approach with which to construct a context-specific definition of the term.

VRQs can enable in-house and outside counsel to engage in a collaborative process to determine fee structures that more closely align outside counsel's interests with those of their clients. Simultaneously, VRQs can provide the basis for more specific measures of the success of those arrangements and other aspects of the client-counsel relationship, including some that are less tangible. In short, VRQs can serve as that framework or approach to the conundrum represented by value.

In light of the confusion and uncertainty surrounding the concept of value, how can we successfully approach the challenge of defining and delivering high-value legal service? We must begin with the basics, recognizing that value does not exist in a vacuum and is not an immutable constant like the speed of light. Rather, it represents the relationship between the "cost" of something and the "benefit" that one enjoys from it. The cost may include more than out-of-pocket expense, and the benefit may be expressed in other than monetary terms.

In this way, the ACC Value Challenge really represents an effort to "recalibrate" value and cost, rather than to "reconnect" them. A *connection* between value and cost has always existed, but the *relationship* between them has become more and more attenuated and unsatisfactory as in-house counsel frequently have experienced instances where the cost outweighed the benefits. They have increasingly come to view the hourly rate as an incentive for outside counsel that does not coincide with clients' interests in cost-effective service.

The benefit that a company derives from legal service can flow from several sources. Some transactions, such as real-estate-secured loans, simply cannot be effected without addressing legal matters; the legal

service is integral to achieving the business goal. The resolution of business disputes typically involves the disputants' lawyers, although companies can and do resolve their differences without much lawyering in many instances. Concluding such transactions and disputes so as to advance one or both parties' business interests constitutes the benefit realized.

In other situations, legal service may be less central to the business activity, but by expediting that activity, preventing law-related complications, or taking advantage of opportunities that exist by virtue of statutory or regulatory structures, legal service can serve an important supportive role in achieving the business's goals, allowing the company to realize more business benefit from the situation than it would have without the lawyers' involvement. It might even add some value to the parties' exertions distinct from their primary business-oriented focus.

What sort of "costs" might a client realize or incur in the context of legal service? (These include some costs that can arise from the purpose for securing legal service, such as litigation, rather than just as a direct result of the legal service itself.) Although some costs are "hard" costs (like legal fees, transaction-associated costs, expert fees and other out-of-pocket expense), others are less measureable, but just as real. They can include:

- reputational harm
- diversion of corporate executives' attention from the business
- heightened regulatory scrutiny
- poisoned business relationships
- distraction of company personnel aware of, but not primarily involved in, the matter

When assessing the value of legal service, one should account for as many costs associated with the matter as possible. The ultimate determination of the value of that service should reflect its net impact on the client's position. If that position has improved, taking into account both costs and benefits realized from the representation, then the legal service provided positive val-

ue to the client. If that position has deteriorated, the legal service may have subtracted value from the business or the transaction.

When developing a framework with which to define value in the context of legal services, keep in mind that the determination of the value of the legal service ultimately is the client's to make. The primary determinant should consist of the degree to which legal service contributes to the client's achievement of its business goals for the assignment. Inasmuch as the client retains counsel in order to achieve its goals with minimal law-related complications and such counsel should serve the client's interests, the value of that service must be measured in the same context. Ultimately, then, value lies in the eyes of the client (or, for in-house counsel, the in-house clients with whom they work). S. LAUER, *THE VALUE-ABLE LAW DEPARTMENT* 4 (Ark Group 2010).

For each client, each law-related matter or project represents an often vastly different set of issues and risks. Each client's appetite for risk varies from those of other business organizations. The legal-service provider must take this into account when delivering legal service. A client that willingly assumes a high level of risk may opt for legal service that elevates cost control to a higher plane even though "cutting corners" might invite greater legal scrutiny and risk. A client that cannot afford or does not want any law-related exposure, on the other hand, might be willing to pay some form of premium for the assurance that such will not occur. Satisfying clients with such disparate attitudes requires a finer calibration of effort by the lawyers (even without the lawyers knowingly assuming high risk).

Understanding how different VRQs matter to the client in a particular set of circumstances can provide the grounding needed to render that calibration. Is cost control the most important aspect of the work to the client at that time? Is a rapid resolution of the issue of greatest concern? Is complete vindication of its position in a dispute the only possible outcome the client would accept?

VRQs can also serve as the basis for a more informed discussion by client and counsel of possible alternatives to the hourly rate as

the means of calculating a fee arrangement. Despite a great deal of discussion over the years of the "evils" of the hourly rate and a recognition that it can distort the efforts of client and counsel to reach a common vision with respect to cost control and budgetary certainty, it continues to serve as the basis for the great bulk of legal fees paid by business clients. For a discussion of the incentives of the hourly rate that disserve clients, see P. LAMB, *ALTERNATIVE FEE ARRANGEMENTS: VALUE FEES AND THE CHANGING LEGAL MARKET* ch. 2 (Ark Group 2011) ("You get what you pay for.").

How do VRQs do so? By enabling counsel to focus on more discrete, measureable elements of value rather than the somewhat vague, nebulous term in its full scope. VRQs allow the dialogue of client and counsel to advance in such a way as to allow for more meaningful application of VRQs to that client's situation. Rather than design a fee arrangement that delivers greater value to the client, VRQs permit the design of fee arrangements that align the thinking of in-house and outside counsel on particular criteria that, in the client's eyes, represent ways in which the legal service can yield it greater business benefit. The incentives in that arrangement, based on VRQs, should lead to behavior by the lawyers that more directly reflects the client's value-related expectations.

## Satisfying Client Demands and Meeting Expectations

Understanding value and its subsidiary components (i.e., VRQs) intellectually and applying those terms to the daily practice of law require a thorough familiarity with both client demands and expectations. We suggest the following framework to reach that understanding.

Figure 1 helps the reader visualize the relationship between VRQs and client expectations. In that figure, specific VRQs are grouped to reflect typical, overarching, value-related goals of a corporate client to which they relate (the points of the pentagon). The internal triangle identifies the usual parties involved in handling a legal matter for such a client and demonstrates that all parties involved in that engagement (illustrated by the triangle within the pentagon) can influence the achievement of value or a failure to do so. The points on the triangle remain the same for the majority of legal engagements. Depending on the client's identified VRQs for the engagement, however, the roles of the entities on the points of the triangle might differ from those for another engagement, as could the impact each entity has on satisfying the identified VRQs. In the majority of cases, the role of in-house counsel will be that of project manager in addition to legal counsel for the business unit.



When thinking about what value means to a client and using Figure 1 as a framework for discussion, one quickly sees that several VRQs could be made part of an engagement. One VRQ can structure an understanding of the cost-management expectation, e.g. budgets, predictability and “no surprises.” Level-of-service elements can emphasize teamwork, urgency, communications, and innovation. Elements around corporate goals, expertise, and resolution will also frame the value equation for this matter.

These VRQs do not stand alone or act independently. They are related and should be integrated and balanced. In some situations, cost management may trump all other VRQs, whereas resolution and urgency might outweigh cost in others. Corporate goals around reputation could very well be the key VRQ. Acknowledging the complex nature of legal services today, it is essential in every situation that counsel always demonstrate teamwork and innovation. Once the VRQ framework has been established for any one engagement, the appropriate roles and responsibilities become more evident.

In the center of the VRQ balancing act stands the in-house counsel. He or she serves as the quarterback of the team. Achieving the goal of each particular play (that play’s VRQ) requires engaging the disparate talents of all members of the team in the right sequence. Experienced project management and communication skills are keys to success. Let’s look at an example.

Corporation A has been served with a lawsuit that involves sifting through years of electronic media, such as e-mail, memos, internal policies, and referenced websites. Approximately half of the data that must be reviewed resides on headquarters servers, whereas the other half is spread across multiple field servers. The request covers 15 years of material. How can VRQs help shape the e-discovery effort of this matter?

Tackling e-discovery clearly requires teamwork if cost goals are to be achieved. The first steps of identifying where the data resides within the corporate IT structure and establishing a strategy for collecting it could be varied in approach. The task

might be assigned to a third-party data-processing vendor and priced by the terabyte, but the vendor’s learning curve could be protracted, and missteps along the way are possible. What about using the company’s IT professionals to do the initial data gathering? Have them partner with the third-party service provider at every step of the way. Alternatively, if requisite software is available in house, assign an IT manager to execute the gathering per specifications agreed to by all counsel.

What if, during the contract attorney review, the responsive document hit rate seems extraordinarily low? Full speed ahead? Probably not. VRQs designed to address level of service would suggest that the results-driven component of the model is not being achieved. Perhaps additional expertise is required for the review of the criteria used to identify potentially responsive documents. Efficient communications and “no surprises” expectations again come into play. The attorney in charge serves as a project manager in order to get the project back on track, and the existence of the VRQ framework plays an important role in evaluating performance and value attainment by all involved.

Another example involves a company with a national footprint. Initially, a decentralized approach was deemed the best model to address a portfolio of relatively predictable and routine legal disputes. One firm’s performance stood above the rest. Thinking about the previous reference to convergence, the company’s law department initiated discussions to determine whether there was a model that would reduce the costs of managing the portfolio. Each of the models suggested required the development of specialized software. Thinking about a firm’s willingness to bear some of the costs associated with recalibrating and expanding their relationship with this client, one firm offered to assume the development costs for the software and was willing to host the software behind its firewall. That firm’s willingness demonstrated a best-foot-forward approach to the client’s work by investing in the relationship. Doing so served the client’s stated VRQs of reasonable cost and greater consistency

among matters. Complete, transparent, and reasonable cost estimates were provided the client for decision-making purposes, and the law firm was able to identify a new competency in its marketing materials for other and potential clients. In this case, VRQs related to Level of Service, Corporate Goals, Expertise, and Cost Management were drivers of the recalibrated relationship.

Now, how do we know everyone is dancing to the same beat? In both examples, cost management was an evident VRQ. Costs related to e-discovery can be and often are unpredictable, unless the client has a grasp of previous experience. Still, the range of cost projections can be extreme. Agreeing to track costs on a per-document basis for variable costs and identifying elements of fixed cost, no matter the volume, should be achievable. Monthly reporting? Probably not frequent enough for variable costs. Expectations based on volume can be projected, and ranges can be established. Weekly variable costs can be reported, unless something drives cost outside of projected ranges, e.g., too many hits, interesting observations, etc. Then, pick up the phone!

Level of service can be evaluated based on feedback from key constituencies. A survey can be an effective way to solicit feedback if the survey is crisp, does not give the responder a clear line of sight to “ho hum” responses, and gives the responder an opportunity to expand on concerns and to make suggestions for improvement. (Responders that take the time to write additional feedback must be specifically acknowledged.) Expertise can also be subjected to feedback surveys.

One of the co-authors was responsible for the appeal of an adverse jury verdict. Due to the nature of the case and its implications on a portfolio-wide basis, three law firms were involved in the appeal. Soon after that verdict, the co-author called a meeting of the three firms to be held in the state in which the verdict was rendered (one of the three firms was based in that state, and the other two were based elsewhere). The host firm was represented by three attorneys (one associate and two partners—one of whom had been responsible for the matter during the



trial phase, and the other of whom was a former chief justice of that state that the client had selected to “quarterback” the appeal). The second firm sent a senior partner and a senior associate, and the third firm sent one senior associate.

During the meeting, the senior partner of the second firm tried to take charge of the meeting, despite the presence of the host firm’s senior partners. After the meeting concluded and upon returning to the office, the author sent the three firms a memorandum assigning each firm a role during the appeal with delineated responsibilities. The author of the memorandum wanted to reduce redundant efforts and potentially overlooked issues that could result when three firms operate somewhat independently. The senior partner of the second firm (who had tried to run the planning meeting) objected to the memorandum, claiming that he had an ethical obligation to consider any issue that he deemed significant despite the other firms’ involvement. The presence of three eminently qualified firms (and a corporate law department with several hundred in-house attorneys) did not sway him from his view. Did that attorney’s actions demonstrate a sensitivity to and appreciation of the client’s VRQs and its desire for close collaboration among the firms? Decidedly not. Once an agreement has been reached regarding VRQs, determining a feedback mechanism or evaluative metric should be relatively easy. If it is not, perhaps the VRQ needs refinement.

We have been discussing VRQs as they apply to the management of legal matters; however, they also can be used to improve the general management of the corporate legal department. How many firms still casually send annual rate increase letters to their clients? Too many, we suspect.

Those letters usually attempt to justify increasing baseline rates or to recognize associates who have broken through to another billing level or status. The baseline increase in rates generally bears no resemblance to overall economic growth and inflation. (For years, corporate America provided two- to four-percent salary increases, and the U.S. economy struggled

to keep pace. What was the rationale that many firms used to ask clients for across-the-board, 10-percent increases in hourly rates?) In some cases, clients fire a preemptive shot across the bow of the ship in the form of a letter such as this:

Dear Firm: We will not accept across-the-board rate increases for the next fiscal year. For those associates you deem entitled to an increase due to achievement, please provide us your firm’s specific performance rationale. We will then solicit input from our professional(s) in charge of the matters on which this associate works, analyze historical rate increases, and let you know if we find the increase appropriate.

Does such a process make sense? Does it feel client-centric? We believe that the answer is obvious.

We are not suggesting that rate increases are never justified. We are suggesting that the VRQ framework can help firms and clients arrive collaboratively at a mutually suitable rate structure, even if a firm is still wedded to the hourly rate methodology as a representation of the value of its legal service. A couple of VRQs jump off the page as particularly useful when discussing firm rate increases: expertise, communications, budgets, “no surprises,” and appropriate cost are examples. If the client is truly your focus, especially from the “long-term relationship” perspective, the model will help in other, nonmatter-specific business processes. Let us look at a couple and hypothesize how thinking differently about rate increases helps a firm become more client-centric.

**Communications.** How do you think a client would feel about receiving a thoughtful letter from the relationship partner seeking feedback about the services provided during the past fiscal period, feedback regarding specific attorney performance, and feedback suggesting how the firm could improve its overall performance in the next fiscal period? Specific performance data reflective of the client’s expressed VRQs enables you to negotiate from an informed position of strength in terms consistent with

the client’s needs and expectations. Where increases may be warranted, the request can be effectively tailored using VRQs.

**Budget Consciousness.** Managing costs against a budget is a corporate mantra. Being over budget should signal an immediate problem for the relationship your firm enjoys with its client. Typically, professionals do not simply wake up one morning and find key matters suddenly over the budget set with the client. Potential cost overruns usually build over time. Do alarms go off if 50 percent of an annual budget has been spent during the first three months of a fiscal period? Do a firm’s systems allow it to monitor costs similarly to its client’s methodology? Is it a crime to be over budget? Clearly so, if a firm and its client do not know why! Keeping track of expenditures against a budget on a frequent schedule benefits both parties.

### Summary

Corporate clients are demanding higher-value legal service because they have seen their legal fees continue to escalate without a demonstration of increased, proportionate business value. To address that demand in a systematic fashion, law firms need an approach that is simple, practical, and consistent. Moreover, whichever approach law firms use must also enable them to address clients’ interest in alternative fee arrangements in a similar way.

Alternative fee arrangements based on the VRQ framework will provide law firms the tools to design metrics and management systems that take into account a variety of fee arrangements because the measurement will be client satisfaction regardless of the specifics of the fee arrangement and without direct relationship to the dollars and cents of those fee arrangements, however those fees are calculated. The benefits of incorporating VRQs into a law firm’s service delivery can extend, however, beyond better fee arrangements; VRQs can lead to improved client relationships, enhanced client satisfaction, and more efficient and effective representation. In other words, they can enable a law firm to set itself up to succeed in the increasingly competitive environment for corporate representation.

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